IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WESCO INSURANCE COMPANY 800 Superior Avenue E., 21st Floor Cleveland, OH 44114, Plaintiff, vs. **PENN NATIONAL SECURITY INSURANCE COMPANY, d/b/a PENN NATIONAL INSURANCE** 2 N. Second St. Harrisburg, PA 17101 and **PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, d/b/a PENN NATIONAL INSURANCE** 2 N. Second St. Harrisburg, PA 17101, Defendants.	CIVIL ACTION NO.________________ **JURY TRIAL DEMANDED**

COMPLAINT

Plaintiff, Wesco Insurance Company, as and for its Complaint against Defendants Penn National Security Insurance Company and Pennsylvania National Mutual Casualty Insurance Company, states as follows:

17927392v.1

INTRODUCTION

1. Plaintiff Wesco Insurance Company brings this Complaint pursuant to Pennsylvania common law and the Declaratory Judgment Act, 28 U.S.C. §2201 et seq. (a) to obtain a declaration that Defendants Penn National Security Insurance Company and Pennsylvania National Mutual Casualty Insurance Company have an obligation to provide primary coverage to Reeves and to defend and indemnify Reeves in a personal injury lawsuit brought by John and Carol McCloskey against Reeves alleging injuries arising out of work performed by or for Coliseum Construction, LLC, a subcontractor to Reeves, (b) to recover damages and attorney's fees for Penn National's and Penn National Mutual's failure to defend and indemnify Reeves, and (c) to obtain relief for unjust enrichment.

PARTIES

2. Plaintiff Wesco Insurance Company ("Wesco") is an insurance company incorporated under the laws of Delaware and having a principal place of business at 800 Superior Avenue E., 21st Floor, Cleveland, Ohio 44114.

3. Defendant Penn National Security Insurance Company, d/b/a Penn National Insurance ("Penn National"), is an insurance company organized under the laws of Pennsylvania having a principal place of business at 2 North Second Street, Harrisburg, PA 17101.

4. Defendant Pennsylvania National Mutual Casualty Insurance Company, d/b/a Penn National Insurance ("Penn National Mutual"), is an insurance company organized under the laws of Pennsylvania having a principal place of business at 2 North Second Street, Harrisburg, PA 17101.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over this action based upon 28 U.S.C. § 1332(a) and 28 U.S.C. § 2201. There is diversity of citizenship of the parties (as the action is between citizens of different States) and the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or occurrences giving rise to this claim occurred in this District. Additionally, venue is proper because both Defendants are considered residents of this District pursuant to 28 U.S.C. § 1391(d).

FACTUAL BACKGROUND

The Subcontract

7. On or about October 9, 2013, Reeves, as general contractor, entered into a contract with the Merion Golf Club, as Owner (the "Golf Club") for the construction of an addition to a pavilion at the Golf Club property in Ardmore, PA.

8. On or about November 7, 2013, Reeves entered into a written subcontract agreement (the "Subcontract") with Coliseum Construction, LLC ("Coliseum"), pursuant to which Coliseum agreed to furnish and install all rough carpentry, insulation, steel stud and drywall, exterior/interior finish carpentry and acoustical ceilings for the Golf Club project. A true and correct copy of the Subcontract is attached hereto as Exhibit A.

9. The Subcontract provides at Exhibit A thereof that Coliseum shall furnish labor, material, means and methods to complete the Work. "

10. The Subcontract provides at Exhibit E thereof that Coliseum is responsible for the means and methods associated with the performance of their Work, including scaffolding and fall protection.

11. The Subcontract provides at Paragraphs 13 and 14 thereof as follows with respect to the obligations of Coliseum to defend and indemnify Reeves:

> 13. To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless, Owner, Architect, Engineer, and E. Allen Reeves and their agents, officers and employees from and against all liability, claims, demands, suits, causes of actions, damages, losses and expenses, including internal costs, attorney's fees, and other legal costs, including but not limited to costs of enforcement the indemnity agreement provisions against Subcontractor and for prosecuting any breach of contract and for cost of defending litigation related to or arising out of such actions, whether or not the actions is prosecuted to judgment, including but not limited to claims against E. Allen Reeves, Inc. and its agents, officers and employees for their own negligence, and for workmen's compensation, whether active or passive, or primary or secondary, arising out of, or related to, or resulting from the performance of Subcontractor's Work, including whether or not any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property (including the Work itself) or to adverse execution of the Work, including the loss of use resulting there from, and/or (2) is caused in whole or in part by any act or omission of Subcontractor, General Contractor, or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder and/or is caused by any breach or failure to comply with the subcontract Agreement by Subcontractor. . . .
>
> 14. In the event General Contractor is the subject of a personal injury or other claim by or regarding an employee of Subcontractor or sub-subcontractors or by others arising out of Subcontractor's Work, regardless of cause or responsibility, Subcontractor shall

> defend and indemnify General Contractor for all related liability, damages, losses and costs. In any and all claims against E. Allen Reeves, Inc., or any of its agents, officers or employees by any employee of the General Contractor, Subcontractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Agreement shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for General Contractor, Subcontractor, or any subcontractor or supplier under Workers' or Workmen's compensation acts, disability benefit or other employee benefit acts. Subcontractor specifically waives protection under Worker's Compensation Laws to the extent necessary to hold General Contractor harmless for any loss under this Agreement.

12. The Subcontract provides at Paragraph 2 thereof as follows with respect to Coliseum's obligation to obtain insurance protecting Reeves on a primary and non-contributory basis:

> Subcontractor shall furnish to General Contractor all insurance certificates prior to start of Work, for Subcontractor and each and every sub-subcontractor of Subcontractor in accordance with the minimum insurance coverage amounts shown in Exhibit "C" and including but not limited to naming E. Allen Reeves, Inc. and others requested as Additional Insured on all required insurance policies including completed operations on a primary and non-contributory basis (See Exhibit "C") for the period of time while at the project site and also after leaving the site, including waivers of subrogation against the Additional Insured for any and all losses experienced, with copies of all applicable policy declaration pages, endorsements, and waivers of subrogation, including those indicated on Sub-contractor's insurance certificate. . . . Upon request, Subcontractor shall provide General Contractor with a copy of insurance policies . . . .

13. Exhibit C to the Subcontract, referenced in the above-quoted provisions of Paragraph 2 of the Subcontract (and included within the Subcontract documents attached hereto

as Exhibit A), required Coliseum to furnish Commercial General Liability coverage on an excess basis with limits of at least $1 million per occurrence and $2 million aggregate for bodily injury and property damage, as well as Umbrella Liability Coverage with per occurrence and aggregate limits of at least $5 million. Exhibit C to the Subcontract further provided that "E. Allen Reeves, Inc. and the Merion Golf Club shall be named as Additional Insured on the General Liability . . . and Umbrella Liability Coverages. It is specifically agreed that E. Allen Reeves, Inc. policies of insurance are excess of any coverage to be provided to E. Allen Reeves, Inc. as Additional Insured."

Penn National's and Wesco's Policies

14. Upon information and belief, Penn National issued Policy No. CX9 0699800 to Coliseum, having effective dates July 17, 2013 to July 17, 2014, and bodily injury coverage limits of $1 million per occurrence and $2 million in the aggregate (the "Penn National Policy").

15. Upon information and belief, Penn National Mutual issued Umbrella Liability Policy No. UL9 0699800 to Coliseum having effective dates July 17, 2013 to July 17, 2014, and coverage limits of $5 million per occurrence and $5 million in the aggregate (the "Penn National Umbrella Policy").

16. As of the filing of this Complaint, Penn National has not provided Wesco or Reeves with a complete copy of the Penn National Policy or the Penn National Umbrella Policy. However, Penn National has provided its Certificate of Insurance to Reeves together with a copy of its Automatic Additional Insureds -- Owners, Contractors And Subcontractors (Ongoing

Operations) endorsement (the "Penn National AI Endorsement"). A true and correct copy of the Certificate of Insurance and AI Endorsement is attached hereto as Exhibit B.

17. Pursuant to the Penn National AI Endorsement, "Who Is An Insured" under the Penn National Policy is modified to include:

> Any person(s) or organization(s) (referred to below as additional Insured) with whom you are required in a written contract or agreement to name as an additional insured, but only with respect to liability for "bodily injury', "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> (1) Your acts or, omissions; or
> (2) The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing Operations for the additional insured(s) at the location or project described in the contract or agreement.

18. Further pursuant to the Penn National AI Endorsement, the insurance provided under the Penn National Policy is primary and non-contributory, as follows:

> This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below, except;
>
> (1) If a written contract or agreement that requires any person(s) or organization(s) to be an additional insured also requires this Insurance to be primary and noncontributory, then this insurance is primary over any other insurance in which the additional insured Is a Named Insured. We will not seek contribution from any other liability policy in which the additional insured is a Named Insured.

19. Upon information and belief, the Penn National Umbrella Policy provides coverages to additional insureds under the same or substantially similar terms as the Penn National Policy for liabilities exceeding the available limits of the Penn National Policy.

20. Wesco issued Policy No. WPP1079513 01 to Reeves having effective dates of January 1, 2014 to January 1, 2015 (the "Wesco Policy").

21. The "other insurance" provisions of the General Liability coverage part of the Wesco Policy provide that the insurance provided by the Wesco Policy is excess over "Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured." A true and correct copy of the relevant portion of the Wesco Policy (the Declarations and the Commercial General Liability Coverage form) is attached hereto as Exhibit C.

Penn National Refuses To Defend And Indemnify Reeves

22. On or about June 11, 2014, McCloskey, an employee of Coliseum, was injured when he fell from a scaffold while working at the Merion Golf Club job site.

23. At the time McCloskey was injured, he was performing work for Coliseum pursuant to the Subcontract between Coliseum and Reeves.

24. On or about February 13, 2015, John and Carol McCloskey filed suit against Reeves in the Court of Common Pleas of Philadelphia County (Case No. 1502-01818) (the "McCloskey Action"). A true and correct copy of the Complaint in the McCloskey Action is attached hereto as Exhibit D.

25. In the McCloskey Action, McCloskey alleges that on or about June 11, 2014, he was standing on a scaffold at the construction site when he fell approximately 6 feet due to "the defective and/or dangerous condition of said scaffolding", resulting in bodily injuries. (Exhibit "D", ¶12).

26. Coliseum has admitted in discovery in the McCloskey Action that the alleged defective scaffolding was supplied to the job site by Coliseum.

27. Coliseum Construction supplied and was responsible for maintaining the scaffolding at issue at all relevant times.

28. Because McCloskey was injured while he was performing work for Coliseum pursuant to the Subcontract, McCloskey's claims against Reeves in the McCloskey Action are claims arising out of, or related to, or resulting from the performance of Coliseum's Work for purposes of the Subcontract, for which Coliseum agreed to defend, indemnify and insure Reeves.

29. McCloskey's claims in the McCloskey Action are at least potentially claims for "bodily injury" caused, in whole or in part, by Coliseum's acts or, omissions; or the acts or omissions of those acting on Coliseum's behalf, in the performance of Coliseum's ongoing Operations for Reeves, for purposes of the Penn National AI Endorsement.

30. Reeves is an insured under the Penn National Policy and the Penn National Umbrella Policy, pursuant to the Penn National AI Endorsement, with respect to the claims set forth in the McCloskey Action.

31. On or about February 23, 2015, the defense of Reeves in the McCloskey Action was tendered to Penn National. See correspondence attached hereto as Exhibit E.

32. Penn National has failed and refused to defend and indemnify Reeves against the claims in the McCloskey Action.

33. Due to the failure of Penn National to honor its obligations to defend and indemnify Reeves, Wesco has provided and continues to provide a defense to Reeves in the McCloskey Action, in the process incurring legal fees and expenses. Through the date hereof, Wesco has incurred substantial sums of legal fees and expenses to defend Reeves in the McCloskey Action. The McCloskey Action is not concluded and defense costs and expenses will continue to accrue.

Need for Declaratory Relief

34. An actual and justiciable controversy exists between Wesco on the one hand, and Penn National and Penn National Mutual on the other hand as to whether the Penn National Policy provides coverage to Reeves for the claims asserted in the McCloskey Action, and whether coverage provided under the Penn National Policy (and the Penn National Umbrella Policy, to the extent applicable) is primary to any coverage provided under the Wesco Policy.

COUNT I

Declaratory Judgment – Duty to Defend

35. Plaintiff incorporates by reference Paragraphs 1 through 34 of this Complaint as if set forth fully at length.

36. The Penn National Policy provides, *inter alia*, that Penn National shall pay those sums which the insured becomes legally liable to pay as damages for "bodily injury" taking place during the policy period and caused by an "occurrence."

37. The Penn National Policy provides that Penn National has the right and duty to defend any suit against the insured seeking damages to which the insurance applies.

38. By virtue of the Penn National AI Endorsement, Reeves is an insured under the Penn National Policy (and, therefore, the Penn National Umbrella Policy to the extent applicable) with respect to the claims in the McCloskey Action.

39. Reeves and Wesco have properly tendered the McCloskey Action to Penn National and have complied with any and all applicable conditions precedent to coverage under the Penn National Policy.

40. Penn National has a duty to defend Reeves in any suit which seeks damages which may potentially be covered under the Penn National Policy.

41. The claims set forth in the McCloskey Action at least potentially constitute claims for "bodily injury" that took place during the policy period of the Penn National Policy caused by an "occurrence" as those terms are defined in the Penn National Policy.

42. Furthermore, the McCloskey Action at least potentially seeks damages for "bodily injury" caused, in whole or in part, by Coliseum's acts or omissions; or the acts or omissions of those acting on Coliseum's behalf, in the performance of Coliseum's ongoing operations for Reeves, for purposes of the Penn National AI Endorsement.

43. Penn National accordingly has a duty to defend Reeves in the McCloskey Action, and is required to provide Reeves a complete defense so long as any of the claims in the McCloskey Action seek damages potentially covered under the Penn National Policy.

44. The coverage provided to Reeves as additional insured under the Penn National Policy (and the Penn National Umbrella Policy, to the extent applicable) is primary to any coverage provided by Wesco.

WHEREFORE, Plaintiff demands judgment in its favor and against Penn National:

a. Declaring that Penn National has a duty to provide Reeves a complete defense in the McCloskey Action;

b. Directing Penn National to pay the entire costs of Reeves's defense in the McCloskey Action;

c. Awarding Plaintiffs their attorney's fees and costs; and

d. Granting such other and further relief as is just.

COUNT II

Declaratory Judgment – Duty to Indemnify

45. Plaintiff incorporates by reference Paragraphs 1 through 44 of this Complaint as if set forth fully at length.

46. The Penn National Policy provides, *inter alia*, that Penn National shall pay those sums which the insured becomes legally liable to pay as damages for "bodily injury" taking place during the policy period and caused by an "occurrence."

47. Upon information and belief, the Penn National Umbrella Policy provides coverage on the same or substantially similar terms as the Penn National Policy for liabilities exceeding the available limits of the Penn National Policy.

48. By virtue of the Penn National AI Endorsement, Reeves is an insured under the Penn National Policy (and, therefore, the Penn National Umbrella Policy to the extent applicable) with respect to the claims in the McCloskey Action.

49. Reeves and Wesco have properly tendered the McCloskey Action to Penn National and have complied with any and all applicable conditions precedent to coverage under the Penn National Policy.

50. Plaintiff denies that Reeves was negligent or is otherwise liable to McCloskey in any capacity. However, to the extent Reeves is found liable to McCloskey in the McCloskey Action, such liability constitutes liability for damages for "bodily injury" that took place during the policy period caused by an "occurrence" as those terms are defined in the Penn National Policy and the Penn National Umbrella Policy.

51. Furthermore, to the extent Reeves is found liable to McCloskey in the McCloskey Action (which is denied), such liability constitutes liability for damages for "bodily injury" caused, in whole or in part, by Coliseum's acts or omissions; or the acts or omissions of those acting on Coliseum's behalf, in the performance of Coliseum's ongoing Operations for Reeves, for purposes of the Penn National AI Endorsement.

52. Therefore, to the extent Reeves is found liable to McCloskey in the McCloskey Action (which is denied), Penn National and Penn National Mutual have a duty to indemnify

Reeves pursuant to the Penn National Policy and the Penn National Umbrella Policy, respectively.

53. The coverage provided to Reeves as additional insured under the Penn National Policy (and the Penn National Umbrella Policy, to the extent applicable) is primary to any coverage provided by Wesco.

WHEREFORE, Plaintiff demands judgment in its favor and against Penn National and Penn National Mutual:

a. Declaring that Penn National and Penn National Mutual have a duty to indemnify Reeves in the McCloskey Action;

b. Directing Penn National and Penn National Mutual to indemnify Reeves fully in the McCloskey Action and to pay any judgment or settlement therein;

c. Awarding Plaintiffs their attorney's fees and costs; and

d. Granting such other and further relief as is just.

COUNT III

Contribution and Reimbursement

54. Plaintiff incorporates by reference Paragraphs 1 through 53 of this Complaint as if set forth fully at length.

55. Wesco has provided a defense to Reeves in the McCloskey Action.

56. Wesco has incurred significant sums in defense costs to provide Reeves with a defense in the McCloskey Action.

57. Penn National's defense obligation with respect to the McCloskey Action is primary to that of Wesco.

58. Penn National agreed in the Penn National Policy not to seek contribution from Reeves or its insurers for the costs of defending Reeves as additional insured.

59. Wesco is therefore entitled to reimbursement from Penn National of the full amount of the defense costs incurred by Wesco in the McCloskey Action.

WHEREFORE, Wesco demands judgment in its favor and against Penn National:

a. Declaring that Penn National has a duty to provide Reeves a complete defense in the McCloskey Action;

b. Awarding judgment to Wesco for the defense costs incurred by Wesco in the McCloskey Action;

c. Directing Penn National to pay the ongoing costs of Reeves's defense in the McCloskey Action;

d. Awarding Wesco its attorney's fees and costs; and

e. Granting such other and further relief as is just.

COUNT IV

Unjust Enrichment

60. Plaintiff incorporates by reference Paragraphs 1 through 59 of this Complaint as if set forth fully at length.

61. Wesco has provided a defense to Reeves in the McCloskey Action. In so doing, Wesco has discharged the defense obligation of Penn National.

62. Penn National's defense obligation with respect to the McCloskey Action is primary to that of Wesco.

63. Penn National has been unjustly enriched by Wesco's discharge of Penn National's defense obligation.

64. Wesco is therefore entitled to recover the defense costs it has expended, plus attorney's fees, to disgorge Penn National's unjust enrichment.

WHEREFORE, Wesco demands judgment in its favor and against Penn National:

a. Awarding judgment to Wesco for the defense costs incurred by Wesco in the McCloskey Action;

b. Awarding Wesco its attorney's fees and costs; and

c. Granting such other and further relief as is just.

Dated: October 19, 2016

Respectfully submitted,

By: ____________________

Gale White (PA ID No. 46485)
Frank J. Perch, III (PA ID No. 39908)
WHITE AND WILLIAMS LLP
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
P: (215) 864-7000
whiteg@whiteandwilliams.com
perchf@whiteandwilliams.com
Counsel for Plaintiff